RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 9 - 2014
OFFICE OF THE CLERK

No. 142, Orig.

IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

SUPPLEMENTAL BRIEF FOR THE STATE OF GEORGIA

SAMUEL S. OLENS
Counsel of Record
ATTORNEY GENERAL
STATE OF GEORGIA
GEORGIA DEPARTMENT OF LAW
40 Capitol Square
Atlanta, GA 30334
(404) 656-3383
AGOlens@law.ga.gov

SETH P. WAXMAN
PAUL R.Q. WOLFSON
CHRISTOPHER E. BABBITT
DANIEL AGUILAR
Special Assistant Attorneys General
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

CHRISTOPHER LANDAU, P.C.
CRAIG S. PRIMIS, P.C.
K. WINN ALLEN
SARAH HAWKINS WARREN
KIRKLAND & ELLIS LLP
Special Assistant Attorneys General
666 15th Street, NW
Washington, DC 20005

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE COURT SHOULD DENY FLORIDA LEAVE TO FILE A COMPLAINT UNTIL THE CORPS HAS COMPLETED ITS REVISIONS TO THE MASTER MANUAL FOR THE ACF BASIN 1

II. THE UNITED STATES' PROPOSED ALTERNATIVES ARE IMPRACTICAL 4

III. FLORIDA CANNOT COMPLAIN OF HARMS THAT IT CONTRIBUTED TO OR CHOSE TO IGNORE 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Page(s)

Arizona v. *California*, 283 U.S. 423 (1931) 3

Arizona v. *California*, 373 U.S. 546 (1963) 2

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) 7

Far East Conference v. *United States*, 342 U.S. 570 (1952) 7

Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) 4

In re MDL-1824 Tri-State Water Rights Litigation, 644 F.3d 1160 (11th Cir. 2011) 8

Mississippi v. *City of Memphis*, 559 U.S. 901 (2010) 3

Reiter v. *Cooper*, 507 U.S. 258 (1993) 6

Southeastern Federal Power Customers, Inc. v. *Geren*, 514 F.3d 1316 (D.C. Cir. 2008) 8

Virginia v. *Maryland*, 540 U.S. 56 (2003) 3

Washington v. *Oregon*, 297 U.S. 517 (1936) 3

DOCKETED CASES

In re MDL-1824 Tri-State Water Rights Litigation, No. 07-md-1 (M.D. Fla.) 8

OTHER AUTHORITIES

Final Updated Scoping Report, Environmental Impact Statement, Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint (ACF) River Basin, in Alabama, Florida, and Georgia (Mar. 2013) 1, 5

IN THE

Supreme Court of the United States

No. 142, Orig.

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

SUPPLEMENTAL BRIEF FOR THE STATE OF GEORGIA

Georgia submits this supplemental brief in response to the United States' amicus brief and Florida's supplemental brief.

I. THE COURT SHOULD DENY FLORIDA LEAVE TO FILE A COMPLAINT UNTIL THE CORPS HAS COMPLETED ITS REVISIONS TO THE MASTER MANUAL FOR THE ACF BASIN

Georgia and the United States agree that it would be premature for Florida's equitable apportionment claim to go forward until, at a minimum, the Army Corps of Engineers issues its revised Master Water Control Manual for the entire ACF Basin. In revising the Master Manual—a process that was delayed by decades of litigation—the Corps is evaluating "changes in basin hydrology and water usage, new or rehabilitated structural features, and environmental issues."

Final Updated Scoping Report, Environmental Impact Statement, Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint (ACF) River Basin, in Alabama, Florida, and Georgia 139 (Mar. 2013) (*Scoping Report*). There is no basis in law or logic for this Court to proceed with a common-law equitable apportionment action unless and until the Corps has completed its statutory duties: federal common law is interstitial in nature, and by definition there are no interstices to fill before the federal statutory framework has been implemented. Thus, as the United States puts it, "[t]he Corps ... implement[s] statutes enacted by Congress to accomplish specified federal purposes on this interstate water system," and "equitable apportionment must give way where Congress has 'exercised its constitutional powers over waters.'" U.S. Br. 19 (quoting *Arizona* v. *California*, 373 U.S. 546, 565 (1963)).

The Corps' updated Master Manual will evaluate and set the minimum flow of water from Georgia's Chattahoochee and Flint Rivers into Florida's Apalachicola River. U.S. Br. 9. Florida points to that flow of water from Jim Woodruff Dam as the cause of its alleged injuries. *See* Compl. ¶¶ 54-59. After the Corps completes its evaluation, the Corps may decide to revise that flow rate as part of the new Master Manual. U.S. Br. 18. If a new flow rate "address[es] some or all of Florida's concerns," there may be no need (or basis) for an original action in this Court. *Id.* 20.

Florida overlooks that the fundamental question is whether it is suffering *harm* from low flows in the Apalachicola—not whether, in the abstract, it is entitled to a particular share of the water in the ACF river system. Florida is therefore wrong to contend that the "'precise question' before the Court here is whether Georgia is taking more than its equitable share" of wa-

ter. Fla. Supp. Br. 8; *see also id.* 5-8. Florida is conflating the *process* of equitable apportionment (allocating States their equitable rights in a river) with the *purpose* of equitable apportionment (mitigating and curing the harms suffered by a downstream State because of an upstream State's excessive diversions). Although the Corps cannot apportion the ACF system (Fla. Supp. Br. 6), that is beside the point. Florida has alleged harms caused by low flows in the Apalachicola River (Compl. ¶¶ 54-59), which will be directly affected by potential changes in the Corps' revised Master Manual (U.S. Br. 9). Until the Corps' revisions are complete, and the new regime for minimum flows in the Apalachicola can be considered, Florida's alleged harms cannot be meaningfully evaluated.

Florida attempts to avoid this conclusion by focusing on its "claims" for an equitable division of water. Fla. Supp. Br. 8. But equitable apportionment does not "vindicate a barren right" to water, *Washington* v. *Oregon*, 297 U.S. 517, 523 (1936); it divides interstate waters to ensure that one State does not "harm[] the other's interest in the river," *Virginia* v. *Maryland*, 540 U.S. 56, 74 n.9 (2003). If a new minimum flow at the Georgia-Florida border eliminates or mitigates Florida's alleged injury, there would be no need for an equitable apportionment. *See Mississippi* v. *City of Memphis*, 559 U.S. 901 (2010) (denying leave to file complaint without prejudice and citing *Virginia*, 540 U.S. at 74 n.9); *Arizona* v. *California*, 283 U.S. 423, 463-464 (1931) (dismissing bill of complaint because "[t]here is no occasion for determining now Arizona's rights to interstate or local waters which have not yet been, and which may never be, appropriated").

The Corps' comprehensive review of the integrated ACF Basin will "provide the Court with relevant in-

formation about the hydrology of the Basin" and "encompass much of the factual development and assessment that would ordinarily be conducted by a Special Master." U.S. Br. 19. Accordingly, there is no basis for this Court to permit Florida's action to proceed until the Corps has finally updated its Manual. Opp. 32. For those reasons, Florida's motion should be denied. Opp. 4, 32; U.S. Br. 1, 12-13, 23.[1]

II. The United States' Proposed Alternatives Are Impractical

Although the United States recommends that the Court should deny Florida's motion as the "preferable course," it alternatively suggests that the Court could stay the proceedings or tailor them "in a manner that minimizes interference with the manual revision process." U.S. Br. 22-23. Those alternative procedures are impractical.

The United States incorrectly suggests (Br. 23) that the parties could "conduct discovery on the Flint pending the Corps' completion of the Master Manual revision," without encountering the same problems that the United States recognizes would bedevil an equitable apportionment proceeding if Florida's action proceeded wholesale, *id.* 17-21. Florida agrees with the United States' alternative proposal, but offers no

---

[1] Even after the Corps issues its new Master Manual, it may not be appropriate for this Court to grant Florida leave to institute an original action. To the extent that Florida disagrees with the Corps' conclusions reflected in the new Master Manual and believes that it will suffer harm as a result of those conclusions, an action in a district court under the Administrative Procedure Act may be a more suitable vehicle for those disagreements to be adjudicated by the courts. *See Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972).

method for segregating discovery on the Flint from the Corps' processes as a whole, other than to offer a tautological response that the "proceedings could be [so] structured." Fla. Supp. Br. 10. Discovery, even limited to the Flint River, would necessarily cover the same "complex matters of hydrology, geology, engineering, and economics" that the Corps is currently evaluating in the ACF as a whole. U.S. Br. 17. The Flint River is part of an integrated hydrological system and cannot be artificially separated from the rest of that system. *See Scoping Report* 2.

Moreover, taking discovery about the Flint River would not be relevant in and of itself; it would be relevant only to the extent it bears on the cause of Florida's alleged harm—low flows in the Apalachicola. Those flows are regulated by the Corps, which considers the flows from both the Flint and the Chattahoochee Rivers, as well as various federal project purposes and environmental requirements, in setting minimum flows from Jim Woodruff Dam. Increases or decreases in the Flint do not necessarily mean an increase or decrease in the Apalachicola. Opp. Br. 19 & n.10. The Flint's effect on the Corps' minimum flows out of Lake Seminole cannot be known until the revised Master Manual is complete. Until then, flow from the Flint will remain a single input within an integrated water system subject to the operations of the Corps. The United States' suggestion of a "limited" proceeding, without a clear delineation between the Corps' current work and the discovery that might be permitted under such a proposal, risks the same duplicative effort and speculative analysis that would plague any equitable apportionment action conducted before the Corps' revisions are com-

plete.[2] Commencing discovery at this time would subject the parties to "time-consuming and expensive" litigation (U.S. Br. 17) that could have little or no ultimate impact on the case, depending on the Corps' updated operations in the ACF Basin.

Nor would it be productive for the Court to grant Florida's motion and then to stay the proceedings until the final Master Manual is implemented. By that time (approximately March 2017 (U.S. Br. 9)), Florida's original complaint will be out of date and will need to be repleaded to reflect new conditions. Certainly Florida will need to replead its allegations of the harm it is supposedly suffering in light of the Corps' revisions (to the extent it suffers or will suffer any harm at all). Florida is wrong to assert that repleading in light of a new minimum flow regime would be a "waste of time and resources." Fla. Supp. Br. 11 n.*.[3]

This conclusion is supported by the doctrine of primary jurisdiction, which, although not directly applicable to this case, does provide instructive reasoning. *See* U.S. Br. 21. Under that doctrine, the courts will "dismiss the case without prejudice" if "the parties would not be unfairly disadvantaged" by dismissal. *Reiter* v. *Cooper*, 507 U.S. 258, 268-269 (1993). That is the case

---

[2] The United States cites no precedent for this suggestion, much less precedent that would provide this Court with a workable example of how parties might conduct "limited" discovery in an original action without duplicating or contradicting an agency's expert analysis of the same complicated facts.

[3] For these reasons, it would also be premature to order the parties to brief at this time whether Florida's current complaint states a claim on which relief can be granted. That issue also ought to be decided on a complaint that reflects the Corps' revised operations and findings. U.S. Br. 22-23; Fla. Supp. Br. 9-10.

here. Florida will not be unfairly disadvantaged by a denial of its motion without prejudice: Florida is not facing a statute-of-limitations bar to its complaint, and it faces no obstacles to instituting a new original action at the proper time. *Far East Conference* v. *United States*, 342 U.S. 570, 577 (1952) (preferring dismissal to stay where "[a] similar suit is easily initiated later, if appropriate"); *cf. Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222-223 (1966).

III. Florida Cannot Complain Of Harms That It Contributed To Or Chose To Ignore

Florida has failed sufficiently to allege either harm or causation that would warrant this Court's original jurisdiction. Florida alleges that its "situation is dire," that "thousands of threatened and endangered mussels have died as a result of low summer flows," that Gulf sturgeon and other fish have had their habitats "adversely affected," and that the low flows in the Apalachicola will cause "irreparable harm." Fla. Supp. Br. 4 (internal quotation marks omitted). Florida concludes its supplemental brief by accusing Georgia of "crippling the environment, ecology, and economy of the Apalachicola region." Fla. Supp. Br. 12.

Many of those very claims were evaluated by the Fish and Wildlife Service (FWS) as part of its 2012 Biological Opinion (BiOp). Opp. App. 8a-11a, 30a-35a. In particular, the FWS concluded that the Apalachicola's current flow rates "'will not jeopardize the continued existence'" or "'destroy or adversely modify designated critical habitat'" for threatened and endangered wildlife in the Apalachicola (Opp. 9-10), including the Gulf sturgeon, the fat threeridge mussel, the purple bankclimber mussel, the Chipola slabshell mussel, or thirty-three other federally listed species (Opp. App. 5a-6a, 8a-11a).

After reviewing the FWS's findings, Florida voluntarily dismissed its APA challenge to an earlier-issued Bi-Op and consciously chose not to challenge the 2012 Bi-Op. Dkt. No. 390, 07-md-1 (M.D. Fla. Dec. 13, 2012). Florida mentions none of this in its supplemental brief, despite its repeated insistence that the alleged harms to its "fish and wildlife, ecology, and economy" require immediate resolution. Fla. Supp. Br. 5.

Likewise, Florida should not be heard to complain about the length of time that it may take the Corps to complete its revisions to the Master Manual. Fla. Supp. Br. 5. The only reason the Corps is working on this particular matter now, instead of twenty years ago, is the recently-concluded protracted litigation that was initiated by Florida and others to prevent the Corps from issuing a near-final revised manual almost a quarter century ago. Florida cannot bemoan the fact that the Corps' revisions may take time when Florida was an initiating and driving force in the litigation that stalled the Corps' revisions for so long.[4] This Court

---

[4] In 1990, Florida joined Alabama's lawsuit to challenge the Corps' draft report to revise operations. *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1174 (11th Cir. 2011). That case was stayed to permit the parties to pursue settlement, and eventually Florida entered into a temporary memorandum of agreement with the Corps, Georgia, and Alabama that nullified the Corps' draft report. *Id.* Florida later entered into an interstate compact which continued to stay proceedings until 2003, at which point they started again. *Id.* at 1174-1175. In 2001, Florida intervened in Georgia's legal challenge to the Corps' denial of a water request. *Id.* at 1176. In 2003, Florida intervened in another lawsuit to challenge a settlement reached between the Corps, Georgia, and others. *Southeastern Federal Power Customers, Inc.* v. *Geren*, 514 F.3d 1316, 1320 (D.C. Cir. 2008). Florida continued its litigation in these related actions until it lost in the court of appeals and this Court denied certiorari. 133 S. Ct. 25 (2012).

should allow the Corps to complete that process now without intrusion and interference from litigation that will replicate its work. Should Florida then disagree with the Corps' conclusions and still contend that its alleged harms remain, there will be more than adequate time—and a proper forum—for its contentions to be heard.

CONCLUSION

Florida's motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

SAMUEL S. OLENS
Counsel of Record
ATTORNEY GENERAL
STATE OF GEORGIA
GEORGIA DEPARTMENT
OF LAW
40 Capitol Square
Atlanta, GA 30334
(404) 656-3383
AGOlens@law.ga.gov

SETH P. WAXMAN
PAUL R.Q. WOLFSON
CHRISTOPHER E. BABBITT
DANIEL AGUILAR
Special Assistant
Attorneys General
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

CHRISTOPHER LANDAU, P.C.
CRAIG S. PRIMIS, P.C.
K. WINN ALLEN
SARAH HAWKINS WARREN
KIRKLAND & ELLIS LLP
Special Assistant
Attorneys General
666 15th Street, NW
Washington, DC 20005

OCTOBER 2014